

# REGULATION.COM. SELF-REGULATION AND CONTRACT GOVERNANCE IN THE PLATFORM ECONOMY: A RESEARCH AGENDA

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*This essay looks at the role of online platforms as rule-makers. The disruption of the Platform Economy has come hand in hand with a broader transformation: the emergence of a post-regulatory society, which feels more and more comfortable with transacting outside conventional legal and regulatory frameworks. This has raised the question as to how to regulate these platforms, if at all. This short piece focuses on how platform businesses are developing their own governance frameworks based on self-regulation, trust, and reputation, which create incentives for online traders to comply with the platforms' terms and conditions. Due to reputational enforcement and network effects, platforms act as powerful gatekeepers of online markets, displaying features of governance through contract. By recommending the use of contract governance as an analytical framework, this essay proposes a research agenda to examine the extent to which these emerging governance frameworks act as a competing alternative to existing forms of State-provided market regulation.*

**Keywords:** Platform Economy, Sharing Economy, self-regulation, contract governance, reputational enforcement

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## I. INTRODUCTION

Globalisation and digitisation have brought about the emergence of new technological, economic and social paradigms. Technological developments have prompted not only a socioeconomic revolution, they are also transforming the legal landscape, the existing legal categories, and even the current understanding of law. This essay focuses on one of the most central issues of the Digital Economy: the role of online platforms as rule-makers.

The existing regulatory regimes struggle in responding to the challenges posed by online platforms. In the meantime, these platforms continue their development and are offering their own normative solutions. This has led to the (spontaneous) emergence of norms generated by the platforms themselves and, to a lesser extent, by their users' community. Platforms' governance frameworks are largely based on reputational mechanisms and trust. Self-regulation is a common feature of platform businesses. However, this essay puts the spotlight on the role of reputational mechanisms (feedback and ratings) as a source of normativity. The main hypothesis is that by providing feedback and rating the services they have used or the products that they have bought, platforms' businesses and users are 'spontaneously' generating new rules. This is particularly true in those cases where users' ratings are used as a benchmark when resolving a private dispute under a dispute settlement procedure embedded in the platform itself. Hence, the reputational system stands as a novel form of dealing with, and regulating, market failures and problems of asymmetric information outside any official law-making procedure. Such developments defy conventional regulatory theories and increase the appeal of digital platforms as an object of legal and interdisciplinary research.

To date, the role and relevance of consumer feedback as a parameter for dispute resolution and its potential as one of the sources of the law of the platform remain, with some exceptions, a largely unexplored terrain, lacking distinctive and compelling research. In Europe, legal scholarship has mainly focused on policy responses. The dominant approach is that this new paradigm for private transactions calls for a reform of EU consumer and contract law to be capable of accommodating new triangular relationships on which platform transactions are based, in order to safeguard consumers' interests and to extend the liability to the platform's intermediary. Some

'cautious' approaches have proposed the use of non-legal categories and self-regulation, but only in combination with regulation. However, these approaches are based on an insufficient understanding of the impact of users' ratings and their potential to develop into generally applicable rules.

Rather than providing a complete picture, this essay serves as a provocation as well as a research agenda into the enquiry of whether this phenomenon is a consequence of the emergence of a post-regulatory society that is calling for a different kind of 'law'. The essay critically enquires if and how online platforms are creating a new non-legal form of (transnational) regulation and the extent to which it is functioning as a viable and competing alternative to existing State market regulation. In so doing, the paper focuses on the different implications of the self-regulation of digital platforms. The paper initially outlines how online platforms, using new forms of self-regulation, based on spontaneously emerged norms and practices, are providing a regulatory alternative to conventional regulation. It also illustrates how platform businesses are built on structures heavily relying on trust and reputation. Finally, the paper also discusses the role and weight of reputational enforcement in dispute-solving. In that way, it offers a new analytical framework for the legal analysis of the Platform Economy based on contract governance. The piece concludes by addressing the necessity to look into the institutional choices that have favoured the emergence and successful development of online platform businesses.

## II. DISRUPTING THE LAW

The Platform Economy is characterised by the existence of a structure, the platform, which enables transactions by connecting two contracting parties, be it for the purchase of a good or the provision of a service. Accordingly, the platform serves as a meeting point that relies on external action to generate a product or service that it is complementary to the platform itself. Online platforms such as Airbnb, Uber or Amazon enlarge consumers' choice by matching sellers and buyers, service providers and service users, credit seekers and investors, landlords and tenants, and the list goes on. The main feature of these platforms is the presence of network effects; the higher the number of users, the more appealing the platform becomes. Nowadays,

online platforms, from many perspectives, resemble nation-states.<sup>1</sup> Data shows that the combined value of the companies representing the Platform Economy is more than \$4.3 trillion and that these companies employ directly 1.3 million people.<sup>2</sup> Facebook manages 1.5 billion users, a 'population' bigger than most countries. Alibaba's transactions amounted to \$248 billion last year.<sup>3</sup> Through their terms and conditions, which platforms' users – usually hastily – accept, these online platforms become the regulators of significant segments of the world's population and the economy.

From a legal perspective, the Platform Economy is reshaping the way in which transactions have been understood so far, and therefore, its regulation poses a difficult challenge for lawmakers.<sup>4</sup> Some of these regulatory challenges include most notably the distinction between peer and trader and how this entails different externalities related to jurisdiction problems, tax avoidance, labour law and consumer law infringements, as well as how services and goods traded through online platforms may represent a risk of non-compliance with health and safety standards. Aware of the dimensions and particularities of this industry, governments (national, regional and local) are extemporaneously creating and enforcing rules and regulations applicable to platform businesses and their participants. However, the existing legal regimes are still unable to provide one-stop regulatory solutions to these phenomena, and that is giving rise to the fragmentation of the regulatory digital space. Governments are aware of fragmentation in the regulation of the Platform Economy and, therefore, are trying to provide comprehensive regulatory frameworks. Yet, the approaches differ significantly. While some governments are relying on traditional regulatory approaches setting up the rules for the emerging industry, other, more liberal, approaches are

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<sup>1</sup> S. P. Choudary, M. W. Van Alstyne, and G. G. Parker, *Platform Revolution: How Networked Markets Are Transforming the Economy-and how to make them work for you* (WW Norton & Company 2016).

<sup>2</sup> The Center for Global Enterprise, 'Global Platform Survey', 2015.

<sup>3</sup> The Wall Street Journal, 'What is Alibaba?' WSJ Project <http://projects.wsj.com/alibaba/> accessed on 19 January 2017. Data from 2016.

<sup>4</sup> W. J. Maxwell and P. Thierry, 'Regulating Digital Platforms in Europe—A White Paper' <https://ssrn.com/abstract=2584873> accessed 10 February 2017. See also V. Hatzopoulos and S. Roma, 'Caring for Sharing? The Collaborative Economy under EU Law', (2017) 54(1) CML Rev 81.

advocating the self-regulation of the sector as a mechanism to attract and to facilitate the proliferation of innovative businesses. A protectionist approach, favoured by some, is to restrict or even to ban certain new services. Two prominent examples are the prohibition of renting entire apartments through Airbnb in Berlin or the banning of Uber services in Spain.

Within the different regulatory solutions, one alternative, the 'analogue' solution, would be to extend the regulatory scope of existing rules and regulations to include the new transactions and players (e.g. extending existing consumer protection rules, devised for the offline world, to peer-to-peer transactions). National judges are already facing these scope problems.<sup>5</sup> This analogue approach would entail the creation of sector-specific rules that take into account the particular features of contractual transactions in the Platform Economy and to set out a dedicated regulatory regime from the outset.<sup>6</sup> Some countries are already preparing dedicated rules, such as the Italian proposal on the Sharing Economy.<sup>7</sup> In addition to this, there are also local and regional regulatory initiatives.<sup>8</sup> However, the inability of domestic initiatives to provide solutions to a borderless phenomenon requires transnational action.

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<sup>5</sup> See Cases C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* ECLI:EU:C:2016:612; C-434/15 *Asociación Profesional Elite Taxi*, nyr; C-526/15 *Uber Belgium BVBA v Taxi Radio Bruxellois NV* ECLI:EU:C:2016:830; and Case C-320/16 *Criminal proceedings against Uber France SAS*, nyr.

<sup>6</sup> Research group on the Law of Digital Services, 'Discussion Draft of a Directive on Online Intermediary Platforms' (2016) 5(4) *Journal of European Consumer and Market Law* 164.

<sup>7</sup> Proposta di legge 'Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell'economia della condivisione', 27 January 2016 <http://www.camera.it/leg17/126?tab=2&leg=17&idDocumento=3564&sede=&tip o=> accessed 7 March 2017.

<sup>8</sup> Examples can be found in: Amsterdam's Action Plan for the Sharing Economy (*Actieplan Deeleconomie*) <http://www.sharenl.nl/nieuws/2016/03/09/actieplan-deeleconomie> accessed 6 March 2017, and the current process by the Catalan Government to review sector-specific legislation to adapt it to the sharing economy and the new sharing economy business models [http://premsa.gencat.cat/pres\\_fs/vp/AppJava/notapremsavw/291907/ca/govern-revisara-normativa-sectorial-actualitzar-regular-leconomia-collaborativa.do](http://premsa.gencat.cat/pres_fs/vp/AppJava/notapremsavw/291907/ca/govern-revisara-normativa-sectorial-actualitzar-regular-leconomia-collaborativa.do) accessed 6 March 2017.

In the EU, since the initial call for more intrusive regulation<sup>9</sup> characterised by the investigation of Amazon's e-book businesses, Google's advertising practices, and Facebook's privacy, the EU's regulatory approach has changed dramatically. For the time being, the European Union is embracing a more flexible and market-based regulatory approach. The European Commission, as part of the Digital Agenda for Europe, has published a Communication on Online Platforms and the Digital Single Market.<sup>10</sup> The Commission suggests the creation of a regulatory model to accommodate the characteristics of the Platform Economy, in particular when it comes to the provision of services by persons who do not fall under the scope of the existing EU consumer protection legislation – online platforms are multisided markets.<sup>11</sup> Moreover, the Commission's proposal: 1) does not propose a new general law on online platforms; 2) advances the partial deregulation of traditional communication services by establishing a level playing field for comparable digital services; and 3) and relies on self-regulation. Other regions across the world have not yet delivered any comprehensive regulatory solution.<sup>12</sup>

Legal scholars are also aware of the challenges posed by digital technologies as to how to effectively regulate them.<sup>13</sup> The Platform Economy calls for a

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<sup>9</sup> Günther Oettinger's (European Commissioner for Digital Economy and Society) Speech at Hannover Messe: 'Europe's Future is Digital', April 2015 [https://ec.europa.eu/commission/2014-2019/oettinger/announcements/speech-hannover-messe-europes-future-digital\\_en](https://ec.europa.eu/commission/2014-2019/oettinger/announcements/speech-hannover-messe-europes-future-digital_en).

<sup>10</sup> European Commission, 'A European Agenda for the Collaborative Economy' <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-356-EN-F1-1.PDF>, 4: '(...) a more flexible regulation of services markets would lead to higher productivity and could ease the market entry of new players, reduce the price for services, and ensure wider choices for consumers'.

<sup>11</sup> European Commission, 'Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM (2016) 288 final <https://ec.europa.eu/digital-singlemarket/en/news/communication-online-platforms-and-digitalsingle-market-opportunities-and-challenges-europe> accessed on 20 November 2016.

<sup>12</sup> See GSMA Mobile Economy Report (2016) <http://www.gsma.com/mobileeconomy>.

<sup>13</sup> A. Murray, *The Regulation of Cyberspace: Control in the Online Environment* (Routledge-Cavendish 2006); C. Reed, *Making Laws for Cyberspace* (OUP 2012); R. Brownsword and K. Yeung (eds), *Rights, Regulation, and the Technological Revolution* (OUP 2008); R. Brownsword and M. Goodwin, *Law and the Technologies of the Twenty-First Century*



new generation of regulation (Regulation 2.0) based on information transparency and data-driven accountability.<sup>14</sup> Against this background, while some claim that the Platform Economy requires a dedicated regulatory framework,<sup>15</sup> some others advocate for the advantages of self-regulation as a tool to attract innovative – and profitable – new businesses.<sup>16</sup> Lastly, a third alternative proposes the creation of a dedicated regulatory framework defining the 'essential requirements'<sup>17</sup> in combination with the creation of a harmonised standard establishing the technical and legal details.<sup>18</sup>

In the meantime, the existing legal concepts and categories devised for the analogue world are struggling to fit the brave new digital world of online platforms. In view of this, self-regulation and reputational mechanisms stand as suitable mechanisms for regulating the new types of transactions facilitated by online platforms. The main argument is the emergence of a new governance framework, which here is referred to as the *spontaneous self-regulation of digital platforms*.<sup>19</sup> This framework emerges bottom-up; from users' rating to standards of quality.

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(CUP 2012); R. Brownsword, E. Scotford, and K. Yeung (eds), *Oxford Handbook on Law, Regulation and Technology* (OUP 2016); A. De Franceschi, *European Contract Law and the Digital Single Market* (Intersentia 2016); R. Schulze and D. Staudenmayer (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Nomos 2016).

<sup>14</sup> N. Grossman, 'Regulation the Internet Way: a data-first model for establishing trust, safety and security. Regulatory Reform for the 21st Century City Project' <http://datasmart.ash.harvard.edu/news/article/white-paper-regulation-the-internet-way-660> accessed 10 December 2016.

<sup>15</sup> See (n 6), and O. Lobel, 'The Law of the Platform' (2016) 16 *Minnesota Law Review* 212.

<sup>16</sup> C. Koopman, M. Mitchell and A. Thierer, 'The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change' (2015) 8(2) *The Journal of Business, Entrepreneurship & the Law*; M. Cohen and A. Sundararajan, 'Self Regulation and innovation in the Peer-to-Peer Sharing Economy' (2015) 82 *U. Chi. L. Rev. Dialogue* 116.

<sup>17</sup> Research group on the Law of Digital Services, see (n 6).

<sup>18</sup> C. Busch, 'Crowdsourcing Consumer Confidence: How to Regulate Online Rating and Review Systems in the Collaborative Economy', in De Franceschi (n 13).

<sup>19</sup> Based on the concept of 'spontaneous governance' in O. Williamson, 'Economic Institutions: Spontaneous and Intentional Governance' (1991) 7 *Journal of Law, Economics, & Organization* 159.

### III. REGULATORY OPT-OUT: TRUST AND REPUTATION AS AN ALTERNATIVE TO STATUTORY RULES

The disruption of the Platform Economy facilitated by technological progress has come hand in hand with a societal transformation.<sup>20</sup> In legal terms, one may even dare to speak about the emergence of a post-regulatory society. Participants in the Platform Economy feel more and more comfortable with transacting outside conventional legal and regulatory frameworks. Platform users find confidence not in the applicable rules, but mostly in the reputation of the other contracting party. In fact, platform businesses, in particular those belonging to the Sharing Economy, are largely designed around trust regimes and reputational ordering.

A trust regime provides a scheme in which the enforcement of the contract is based on a secured credible commitment, as understood by North.<sup>21</sup> Under such a regime, enforcement relies on a system of reputational feedback that builds on ratings and reputational quality, and where traders long to be esteemed.<sup>22</sup> Such a system of quality compliance is largely generated spontaneously by users' feedback, giving rise to standards of quality. It is, therefore, a process of peer review that ensures the compliance with minimum quality requirements. Under this system, standards would act as 'private judges', as understood by Williamson.<sup>23</sup> They will make the reputation system 'more effective as a mean of promoting trade (...). [T]he system is designed to promote private resolution of disputes and otherwise to transmit *just enough* information to the right people in the right

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<sup>20</sup> P. Mason, *Postcapitalism: A Guide to Our Future* (Macmillan 2016); C. Anderson, *The Long Tail: Why the Future of Business is Selling Less of More* (Hachette Books 2006) and *The Longer Long Tail* (Random House Business 2009).

<sup>21</sup> D. C. North, 'Institutions and Credible Commitment' *Journal of Institutional and Theoretical Economics* (JITE)/*Zeitschrift für die gesamte Staatswissenschaft*, (1993) II.

<sup>22</sup> See in this point Ch. III of Section ('Of the effects of prosperity and adversity upon the judgment of mankind...') within Part I ('On the prosperity of action') in A. Smith, *The Theory of Moral Sentiments*. (first published 1759, Penguin 2010).

<sup>23</sup> See (n 19).



circumstances to enable the reputation mechanism to function effectively for enforcement'.<sup>24</sup>

This is an illustration of the opportunistic conditions favoured by the network effects inherent to the Platform Economy. In terms of game theory, reputational mechanisms together with the role of platform businesses as gatekeepers of large markets would explain the collective behavioural patterns observed among platform users. A cooperative behaviour will be preferred over non-cooperation, provided that cooperation preserves market access conditions whereas non-cooperation excludes them.<sup>25</sup> Against this background, platform businesses are currently leading a (spontaneous) process of regulatory innovation in response to the ongoing economic, technological and societal transformations. These regulatory and institutional innovations represent a market response to the demands for regulation of the society in the Digital Age, which conventional forms of regulation and enforcement (judicial and extrajudicial) cannot easily replicate.

Using services provided in the context of the Sharing Economy means opting-out from regulation.<sup>26</sup> This leads to a process of de-regulation and, ultimately, to re-regulation, based on self-regulation. Such process entails far-reaching implications for conventional regulatory theory. Thus, it is therefore necessary to rethink the nature and the role of these emerging 'post regulatory' norms and processes.

Opting-out from regulation, i.e. the adoption of a self-regulatory approach based on community-created rules and practices, has already proved to be a successful strategy for certain sectors.<sup>27</sup> Nevertheless, some scholars are

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<sup>24</sup> P. R. Milgrom and D. C. North, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs' *Economics & Politics* (1990) 2(1) 1.

<sup>25</sup> G.-P. Callies and M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance' *Ratio Juris* (2009) 2(2) 260.

<sup>26</sup> Cf. L. Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21(1) *The Journal of Legal Studies* 115, 57.

<sup>27</sup> *ibid*, see also L. Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions' (2001) U Chicago Law & Economics, Olin Working Paper No. 133.

reluctant to the use of reputation mechanisms as a *total replacement* of regulation.<sup>28</sup> Against this background, international standardisation stands as an alternative regulatory back-up solution devised for problems of institutional design; e.g. reputation mechanisms can be vulnerable to bias and abuse. The creation of international standards establishing procedural guarantees stands as a solution to design problems posed by reputational frameworks. In the field of online reputation, the International Standards Organization (ISO) has already initiated the works on standardisation of online reputation. The aim of the standard is to standardise methods, tools, processes, measures and best practices related to the online reputation of organisations or individuals providing services or products, derived from user-generated content (ISO/TC 290 – Online reputation).<sup>29</sup>

In terms of transnational governance, the new technological environment has changed the rules of the game and it is giving rise to new modes of power, governance and ownership.<sup>30</sup> Participation is now networked and peer driven.<sup>31</sup> This has entailed a transformation in transnational governance, where standardisation is placed at the 'core of the emerging Transnational New Governance system'.<sup>32</sup> The self-regulatory practices of standards, codes of conducts or best practices function as drivers of decentralisation of regulation.<sup>33</sup> In the case of the Platform Economy, where the markets are instead being de-regulated,<sup>34</sup> this paper adds that the development of digital

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<sup>28</sup> Busch (n 18).

<sup>29</sup> The creation of this global standard is based on the model developed by the French Association for Standardisation, AFNOR, in 2013. AFNOR, French Standard NF Z 74-501 – *Avis en ligne de consommateurs – Principes et exigences portant sur les processus de collecte, modération et restitution des avis en ligne de consommateurs* (19 July 2013).

<sup>30</sup> M. Naím, *The End of Power: from boardrooms to battlefields and churches to states, why being in charge isn't what it used to be* (Basic Books 2014).

<sup>31</sup> J. Heimans and H. Timms, 'Understanding "New Power"' (2016) 92(12) Harvard Business Review 15.

<sup>32</sup> K. W. Abbott and D. Snidal, 'International Regulation Without International Government: Improving IO Performance Through Orchestration', (2010) 5(3) The Review of International Organizations 315,44.

<sup>33</sup> J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54(1) Current legal problems 103.

<sup>34</sup> B. Edelman and D. Geradin, 'Spontaneous Deregulation' (2016) 94(4) Harvard Business Review 80.

platforms constitutes a process of decentralisation not only of regulation, but also of de-regulation. Therefore, this spontaneous self-regulation serves as a proxy for new forms of transnational governance.<sup>35</sup> Preliminary research conducted so far, suggests that spontaneous self-regulatory solutions based on the 'network communitarianism governance' model<sup>36</sup> are responses to the challenges of regulatory legitimacy, effectiveness and connection.<sup>37</sup> However, it remains to be seen to what extent platforms exert control over the flow of information within the platform to assess whether they are effectively channelling 'collective action' and setting new quality standards based on users' expectations, paying attention to the deficiencies encountered by Sunstein in his *Republic.com*.<sup>38</sup>

#### IV. REPUTATIONAL ENFORCEMENT BASED ON DISPUTE RESOLUTION AND CONTRACT GOVERNANCE

Law enforcement is experiencing a process of transformation,<sup>39</sup> which is challenging the understanding not only of 'justice' but also the concept 'law' itself. This narrative is amplified with the introduction of digital technologies in conflict management. In order to overcome the legitimacy and procedural challenges posed by Online Dispute Resolution (ODR) mechanisms, at least in Europe, these procedures have been equipped with a combination of *ex-ante* (certification) and *ex-post* (monitoring) procedural guarantees.<sup>40</sup> Much

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<sup>35</sup> N. Elkin-Koren and E. Haber, 'Governance by Proxy' (2016) 82(1) Brooklyn Law Review 105.

<sup>36</sup> A. Murray, 'Nodes and Gravity in Virtual Space' (2011) 5(2) Legisprudence 195.

<sup>37</sup> As identified in Brownsword (n 13).

<sup>38</sup> C. R. Sunstein, *Republic.com* (Princeton University Press 2001), and *Republic.com 2.0* (Princeton University Press 2009).

<sup>39</sup> H.-W. Micklitz and A. Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hart Publishing 2016). See also Micklitz 'The Transformation of Enforcement in European Private Law: Preliminary Considerations', (2015) 23(4) European Review of Private Law 491.

<sup>40</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes [2013] OJ L 165/1 and Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes [2013] OJ 165/63.

has been written about how an effectively designed ODR mechanism contributes to placing trust in the market.<sup>41</sup>

Here, attention is paid to the potential of online platforms which offer embedded mechanisms for dispute resolution, for the development of a new mechanism of law enforcement. The primary aim of these platforms is not to offer a successful ODR model, but rather to provide a venue for dispute resolution as an organic complement to the transactions taking place via the platform. These 'integrated' venues for dispute resolution stand as a mechanism of enforcement separated not only from judicial enforcement but also from more generic manifestations of extrajudicial settlement. In this regard, where accessibility, speed, affordability and the existence of attractive remedies<sup>42</sup> is a strong asset in the platforms' dispute resolution mechanism, platforms can effectively compete against the State-provided enforcement structure. In view of that, it is perhaps of major significance to ask why, while 40% EU traders do not even know about the existence of Alternative Dispute Resolution mechanisms,<sup>43</sup> eBay handles 60 million cases per year.<sup>44</sup> Probably the answer to this pressing question lies in the institutional (and contractual) design of the embedded dispute resolution mechanisms. Moreover, the lack of effective incentives for traders to engage in ODR procedures like the EU ODR Platform<sup>45</sup> has resulted in the automatic closing of 55% of the total submitted complaints because traders have not responded. Against this background, an enquiry is to be made

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<sup>41</sup> E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (John Wiley & Sons 2001); P. Cortés, *Online Dispute Resolution for Consumers in the European Union* (Taylor & Francis, 2011); J. Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009); G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004), to mention a few.

<sup>42</sup> Callies and Renner (n 25).

<sup>43</sup> European Commission, 'Settling consumer disputes online' Factsheet, January 2016.

<sup>44</sup> UK Civil Justice Council, 'Online Dispute Resolution for Law Value Civil Claims' (Online Dispute Resolution Advisory Group) 2015 <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> accessed 10 December 2016.

<sup>45</sup> EU Online Dispute Resolution Platform <https://webgate.ec.europa.eu/odr/main/?event=main.home.show> accessed 10 December 2016.

concerning the extent to which online platforms might be contributing to bridging this 'ODR trust gap'.

The incorporation of dispute resolution within the intermediary platform may create a *de facto* monopoly over enforcement. On the one hand, especially when it comes to small claims, chargeback mechanisms may serve as an effective remedy without having to rely on the support of state courts or private authorities.<sup>46</sup>

On the other hand, by making participation in dispute resolution part of their terms and conditions, online platforms are offering effective incentives for traders to engage in the resolution of disputes. In so doing, the platform is acting as a *gatekeeper* of the market, provided that the trader wishes to remain trading via the platform as well as to improve, or at least to maintain, its reputational record. Thus, by providing a 'designed for trust' environment, online platforms are putting in place a mechanism of enforcement by exclusion. A non-collaborative behaviour in the event of a dispute may entail the exclusion of the platform by the removal of the listing or the cancellation of the registration; a consequence that may be exponentially amplified as a result of network effects. Moreover, some online platforms also display features of a governance by self-commitment and unilateral standard-setting, which set out the conditions for market access.<sup>47</sup>

In this way, digital platforms can be seen as an illustration of cooperative regulation based on self-organisation and self-commitment, whereas the contract design of digital platforms offers a paradigmatic example of one of the manifestations of contract governance; governance through contract.<sup>48</sup>

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<sup>46</sup> P. Ortolani, 'Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin' (2016) 36(3) *Oxford Journal of Legal Studies* 595.

<sup>47</sup> By way of example, Airbnb has included a Non-discrimination policy: <https://es.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect>, Responsible hosting guidance: <https://es.airbnb.com/help/article/1397/responsible-hosting>, Hosting standards: <https://es.airbnb.com/help/topic/206/hosting-standards> and a Code of conduct: <https://openair.byairbnb.com/conduct.html>.

<sup>48</sup> F. Möslin and K. Riesenhuber, 'Contract Governance – A draft research agenda' (2009) 5(3) *European Review of Contract Law* 248, 89. S. Grundmann, F. Möslin and

In view of this, contract governance offers a precise conceptual and analytical framework for developing the ideas associated with the emergence of platform businesses as rules-givers.

Three important questions should be asked in relation to the role of platform businesses in dispute resolution: 1) whether platforms' innovations offer a more efficient venue – involving advantages in terms of speed and cost – to solving small disputes; 2) whether such advantages could be simulated by judicial redress and public forms of Alternative and Online Dispute Resolution (ADR, ODR) or other forms of adjudication; and ultimately 3) whether the advantages accompanying these embedded venues for dispute resolution are amounting to the displacement of enforcement from courts and administrative structures (hierarchies) to platforms (markets) against possible drawbacks or risks in terms of material justice.

## V. CONCLUDING REMARKS

This paper is concerned with the role of online platforms as a manifestation of decentralised regulatory innovation through private legal ordering by means of private contract and private dispute settlement. In particular, it puts the spotlight on the actual potential of reputational systems as a non-legal source of normativity and capable of shaping (bottom-up) a regulatory regime outside established and conventional legal sources. Under these reputational regimes, ratings become a new benchmark for quality and can be used as parameters for dispute resolution, effectively replacing legal categories of rules and enforcement. This raises the question as to whether Regulation.com provides the enabling conditions for the development of an alternative normative order to State-provided norms.

Regulation.com thus poses questions ranging from issues of institutional design and the role of reputational enforcement to the understanding of law and regulation. Given the size and social relevance of the Platform Economy, there is a clear demand for a multidisciplinary and transnational research agenda. The current state urges academics to reflect on how online platforms,

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K. Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (OUP 2015).



and especially those platforms belonging to the Sharing Economy, are not only disrupting the economy but its underlying structure.

Further research is needed in order to examine the advantages and disadvantages of these emerging governance regimes vis-à-vis conventional forms of regulation. Attention is to be paid to the extent to which contract governance lays the foundation for these developments to take place, and how a contract governance framework based on reputational mechanisms and platforms' enforcement capabilities ultimately may serve as a proxy for transnational (and spontaneous) governance. Normatively, this provoking argument would challenge the application of analogue solutions to the digital realm by casting doubts on the creation and application of a formal regulatory framework as the most appropriate response to a trillion-dollar industry that has largely developed outside existing legislation.